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THE STATUTE OF FRAUDS AND PART PERFORMANCE OF LAND CONTRACTS IN KENTUCKY.

It is a well settled rule in Kentucky that a part performance will not remove a contract for the sale of land from operation of the Statute of Frauds. There is, however, an equitable modification of this rule created by a long line of judicial decisions founded on sound principles of equity as applied to the facts of each particular case. These decisions were born of the principle that since the Statute of Frauds was created to prevent fraud it must never be allowed to be used in the perpetration of a fraud. The general rule with its equitable modification is clearly set out in the case of *Crain v. Crain et al.*¹ in which the court said:

"The rule is well established in this state that a verbal contract for the sale or transfer of land is unenforceable and invalid. This rule, however, is modified in cases where the grantee is placed in possession of the land and while there bona fide claiming and holding the land as his, puts valuable permanent improvements thereon. In such case the grantor cannot recover the land until he places the grantee in *status quo*."

In the case of *Usher's Exr. v. Flood*² U had reared F and in consideration of valuable services rendered to him by F, promised to give F a house and lot. F went into possession. The court held that the parol gift did not entitle F to the property but only to a lien thereon for the value of his services and improvements.

It was held in *Dean v. Cassidy*³ that where one erected improvements upon the land of another under a verbal contract between them, the Chancellor was correct in ordering a sale of the property at the instance of the party who erected the improvements and in dividing the proceeds in the proportion of the value of the lot and the improvements.

The case of *Bobbitt v. James*⁴ was very much like that of *Usher v. Flood*, supra. M promised B that if he would come to her home and care for her and her property during her

¹ 197 Ky. 813; 248 S. W. 176 (1922).

² 83 Ky. 552 (1884).

³ 88 Ky. 572 (1888).

⁴ 148 Ky. 244 (1912).

life she would give to him her farm. B complied with this request. The court held that he was not entitled by this verbal contract and performance to the land but could only subject the land to a reasonable value for his services and improvements.

Thus it is clear from these leading cases cited that Kentucky, while refusing to allow a part performance to take a contract out of the Statute of Frauds, does protect those who so partly perform by requiring that they receive pecuniary remuneration for whatever expense they incurred by acting on the faith of the parol agreement.

Although, this rule is contra to the weight of authority in both this country and in England, it doubtlessly represents the better view of the law.

That section of the Statute of Frauds relating to contracts for the sale of land is as follows:

"No action shall be brought to charge any person . . . Sixthly, upon any contract for the sale of real estate or any lease thereof for longer term than one year, unless the promise, contract, agreement etc., be in writing."

This statute does not render an oral contract for the sale of land void but simply declares that no action shall be brought upon such a contract. It was passed for the purpose of preventing fraud by the perjuries that might creep into oral evidence in these cases. It demands that there be written evidence of a contract and that only written evidence will support an action.

The courts in the majority of the states, in allowing part performances to remove an oral contract from the Statute of Frauds, seek to justify the formation of their exception to the Statute by saying that there is another type of evidence that is equally as good as written evidence. This is made up of acts which they claim point unequivocally to a contract for the sale of land. They say that if A goes into possession of B's land and builds barns, fences, etc., he has performed acts which point unequivocally to a contract to buy the land and such part performance is held to exist as to take the oral contract out of the Statute of Frauds.

This substitution is unsound. It is admitted that such acts point to a contract but they do not point out unequivocally

the terms and nature of the contract. They do not show whether it was a lease for 5, 20 or 60 years or a contract to convey a life estate or fee simple title. They may point to one or the other but they do not show the exact contractual relations of the parties. In order to ascertain these under the majority rule the statutory safeguard against oral perjuries must be let down. Part performance is a relative thing. Acts which might constitute part performance of a lease for 5 years would not necessarily amount to part performance of a contract to convey a fee simple title. It follows in every case that before it can be ascertained whether or not the contract has been in part performed the questions, Did the parties agree? and What were the terms of the agreement? must be answered by parol evidence. This, in the face of the requirement of the statute that these questions be answered only by written evidence.⁵ In the case of *Grant's Heirs v. Craigmiles*⁶ the court said:

"Some judges have thought that another kind of evidence was equivalent to written evidence, such as paying consideration, being let into possession, making valuable improvements, etc. . . . The same fraud and perjury which can conceive and prove the agreement by parol can also prove the performance in part; but where the law is known, the party who fails to get the land agreed for because he is without the evidence required must take the blame on himself, for it is his own folly or negligence that has made him part with his money in expectation of the land, or, e converso, the possession of the land in expectation of the price, without the requisite evidence and in the very teeth of the statute."

Kentucky, in refusing to adopt the majority rule has clung to a sound and unassailable view of the law. The equitable modification of the iron-clad rule of this jurisdiction is based upon the soundest of legal principles and reasoning. Following the principle that the Statute of Frauds must not be used as a means to accomplish an injustice, the courts have consistently held that the statute did not make an oral contract void but only said that no action could be maintained on it; that there was a good contract existing between the parties the only defect being that no suit could be brought upon it; that this contract would be used as a shield to prevent the perpetration of a fraud. Hence on the strength of this oral

⁵ *Holtzclaw v. Blackerby*, 9 Bush 40 (1872).

⁶ 1 Bibb. 205 (1808).

contract it was sound law to require the vendor of the land to place the vendee in *status quo* as a condition precedent to his recovery of the land.

It is submitted that both as a matter of policy and of legal interpretation, Kentucky's view is the more desirable. Though the majority rule may offer a convenience in a particular case, at the same time it opens the door to other frauds and injuries in that the same perjuries may be used to prove the part performance that are used to prove the oral contract. Hence the possibility of fraud is increased rather than decreased. On the other hand, Kentucky, while clinging to the true letter of the law, yet applies the balm of equity to the injuries of the oral contractor. Though he is by his own folly and negligence deprived of an expectancy, he is placed in *status quo* insofar as is practically possible by pecuniary compensation.

H. R. WILHOIT.